

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**DPMG JUNIPER, LLC**

) OTA Case No. 20035914  
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**OPINION**

Representing the Parties:

For Appellant: Sabby Jonathan, CPA

For Respondent: Eric R. Brown, Tax Counsel III

For Office of Tax Appeals: Linda Frenklak, Tax Counsel V

J. MARGOLIS, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, DPMG Juniper, LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$800, a late-filing penalty of \$200, a demand penalty of \$200, and a filing enforcement cost recovery fee of \$85, plus interest, for the 2017 tax year.

Appellant waived its right to an oral hearing; therefore, the matter is being decided based on the written record.

**ISSUES**

1. Whether appellant was “doing business” in California within the meaning of R&TC section 23101, such that it was required to file a 2017 California return and pay the corporate minimum franchise tax of \$800.
2. Whether appellant is liable for a late-filing penalty under R&TC section 19131.
3. Whether appellant is liable for a demand penalty under R&TC section 19133.
4. Whether the filing enforcement cost recovery fee should be abated.

FACTUAL FINDINGS

1. Appellant is a limited liability company (LLC) that was organized in Arizona on January 7, 2016. Appellant's articles of organization list only two members, J. Roberts and D. Gilbert, both having the same post office box mailing address in California. According to those articles, appellant is managed by its two members.
2. Appellant is taxable as a corporation for federal and California tax purposes.
3. Appellant did not file a 2017 California return. FTB received information from the Internal Revenue Service (IRS) that appellant filed a 2017 U.S. Corporation Income Tax Return (Form 1120), listing the California post office box of its member-managers as its address.
4. Numerous documents suggest that both of appellant's member-managers, J. Roberts and D. Gilbert, resided in California during the relevant time period. As noted above, appellant's articles of organization, filed in 2016, showed the same California mailing address for J. Robert and D. Gilbert. In addition, a 2017 California return filed by Skyline Development Co., LLC, a single-member LLC owned by D. Gilbert, showed a California address for D. Gilbert. A filing with the California Secretary of State's Office in 2018 also showed California addresses for D. Gilbert and J. Roberts. And J. Roberts corresponded with FTB concerning appellant's tax affairs in 2019 using a California address.
5. FTB sent appellant a Demand for Tax Return dated May 8, 2019 (the Demand), requesting appellant do one of the following by June 12, 2019: (1) file a 2017 California return and pay its tax liability; (2) complete and return FTB 4694 ENS, Nonqualified Business Entity Questionnaire (Questionnaire), parts 1, 4, and 5, if it already filed a 2017 California return; or (3) complete and submit the Questionnaire, parts 2, 3, 4, and 5, if it was unsure whether it needed to file a 2017 California return. The Demand stated that if appellant failed to respond by the deadline, FTB may assess tax, a demand penalty, a late-filing penalty, and a filing enforcement cost recovery fee, plus interest.
6. Appellant failed to respond to the Demand by the June 12, 2019 deadline. However, on July 8, 2019, FTB received an incomplete response to the Questionnaire. In it, appellant stated that it "is an Arizona LLC and has no sourced income or property owned in

- California[.] Therefore[, it] is not required to file a California tax return.” J. Roberts signed the Questionnaire on behalf of appellant in her capacity as its member.
7. On July 18, 2019, FTB issued a Notice of Proposed Assessment (NPA) to appellant proposing a corporate minimum tax liability of \$800, a late-filing penalty of \$200, a demand penalty of \$200, and a filing enforcement cost recovery fee of \$85, plus interest.
  8. Appellant timely protested the NPA, reiterating what it stated in its response to the Questionnaire.
  9. In a letter to appellant dated September 6, 2019, FTB requested additional information concerning appellant’s state of registration and its relationship with the California address listed on its 2017 federal income tax return.
  10. By response letter signed by J. Roberts and dated September 25, 2019, appellant stated that it was registered in Arizona; its only asset was undeveloped land in Arizona; it had never earned any income from its property or from any other activities; and that it had listed the California post office box address on its 2017 federal return “for convenience purposes only, as one of the LLC members lives in California and there is currently no contact person in Arizona due to no activity in this LLC.”
  11. On February 20, 2020, FTB issued a Notice of Action affirming the NPA.
  12. This timely appeal followed.
  13. On appeal, FTB produced documentation from the Maricopa County, Arizona, Assessor’s Office showing that: appellant owned real property in Chandler, Arizona, since at least November 29, 2017; the documentation described the Arizona property as having been used as “vacant commercial land” in 2018,<sup>1</sup> as “partially complete commercial” property in 2019, and as “warehouse” property in 2020 and 2021.
  14. FTB also produced a copy of appellant’s 2017 IRS tax return transcript showing that: appellant reported zero income and zero deductions for 2017; appellant had \$2,520,500 in total assets at the beginning of 2017 and \$2,624,054 at year-end; and, as noted earlier, appellant filed a 2017 IRS Form 1120 on March 14, 2018, listing the same California mailing address as shown in its articles for its members.

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<sup>1</sup> Although we presume that the “tax years” referred to in the Maricopa County Assessor’s Office documentation are fiscal years and not calendar years, we conclude from the evidence as a whole that the property was vacant land that was zoned for commercial use during the 2017 calendar year at issue in this appeal.

15. FTB also produced a California tax return filed by Desert Palm Management Group, LLC (Desert Palm), a single-member LLC owned by D. Gilbert (one of appellant’s managing members), indicating that Desert Palm had a loan outstanding to appellant throughout 2017 of over \$500,000.

### DISCUSSION

Issue 1: Whether appellant was “doing business” in California within the meaning of R&TC section 23101, such that it was required to file a 2017 California return and pay the minimum corporate franchise tax of \$800.

FTB’s determination of tax is presumed to be correct, and the taxpayer has the burden of proving otherwise. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) Unsupported assertions are not sufficient to satisfy that burden of proof. (*Appeal of Magidow, supra.*) FTB’s determination cannot successfully be rebutted when the taxpayer fails to provide credible, competent, and relevant evidence as to the issues in dispute. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.)

If an LLC is “doing business” in California within the meaning of R&TC section 23101, and that LLC has elected to be treated as a corporation for tax purposes, it is subject to the corporate franchise or income taxes imposed under Part 11 of the R&TC, and must file a California Corporation Franchise or Income Tax Return (Form 100). The issue in this appeal is whether appellant was doing business in California.

Under R&TC section 23101(a), “doing business” is defined as “actively engaging in any transaction for the purpose of financial or pecuniary gain or profit.” In addition, for taxable years beginning on or after January 1, 2011, R&TC section 23101(b)(1) provides that a corporation that is “commercially domiciled” in California also is doing business in California.<sup>2</sup> “The essence of the concept of commercial domicile is that it is the place where the corporate management functions, the place where real control exists with respect to the business activities of the corporation.”<sup>3</sup> (*Appeal of Norton Simon, Inc.* (72-SBE-008) 1972 WL 2642.)

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<sup>2</sup> There are other bright-line conditions upon which an entity will be deemed to be doing business in California (see R&TC, § 23101(b)(2)-(4)), but FTB has not alleged that any of those conditions apply here.

<sup>3</sup> Admittedly, however, other formulations exist for determining an entity’s commercial domicile. As stated in *Appeal of Vinnell Corp.* (78-SBE-030) 1978 WL 3943:

FTB principally contends that appellant was doing business in California because it was commercially domiciled here. FTB supports its position by noting that appellant's 2017 federal tax return showed a California address, and that both of appellant's managing members (J. Roberts and D. Gilbert) appear to have been located in California during 2017.

Appellant disagrees, countering that FTB based its determination upon "convenient assumptions" arising from appellant's use of a California mailing address, rather than the "actual facts" regarding appellant's activity (or lack thereof), where that activity was conducted, and by whom.<sup>4</sup> Appellant notes that it was formed and registered to do business in Arizona, not California, and contends that it has never done business in California, has no members that performed any activity in California, and does not have any California property, sales, or employee compensation. Appellant claims that its only asset during 2017 was undeveloped land located in Arizona, and that it "has not earned any income since inception from this property or any other activities." Because appellant had no California-source income (indeed, no income anywhere) during 2017, appellant contends it was not required to file a California return and pay California tax.

Appellant explains that its use of a California post office box address was "for convenience purposes only, as one of the LLC members lives in California and there is currently no contact person in Arizona due to no activity in this LLC." Appellant also alleges that: "In fact, the managerial functions of the LLC are conducted by the other managing member - the one

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The concept of commercial domicile has been described in various ways: the headquarters for the transaction of business or the principal office from which the corporate management is conducted (*Southern Natural Gas Corp. v. Alabama*, 301 U.S. 148, 153 [81 L. Ed. 970] (1937)); the place where the corporation is managed and operated (*Smith v. Ajax Pipe Line Co.*, 87 F.2d 567 (8th Cir. 1937)); the state where, under the facts, the corporation receives its greatest protection and benefits, that state where the greatest proportion of its control exists (*Southern Pacific Co. v. McColgan*, [1945] 68 Cal. App. 2d [48] at 81); the state where the corporation maintains its general business office, the center of authority, the actual seat of the corporate government (*Wheeling Steel Corp. v. Fox*, [1936] 298 U.S. [193] at 211-212); the place from which the corporation's business is managed (*Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 652 (1942)); the state in which the corporation engages in its greatest and most centralized activity (*Appeal of Flexible, Inc.*, [1966 WL 1410] Cal. St. Bd. of Equal., Nov. 23, 1966); and the place from which the business is directed and controlled and where a major part of the business is conducted (*Appeal of Safeway Stores*, [1962 WL 1421] Cal. St. Bd. of Equal., March 2, 1962).

In addition, California's Uniform Division of Income for Tax Purposes Act defines "commercial domicile" as "the principal place from which the trade or business of the taxpayer is directed or managed." (R&TC, § 25120(b).)

<sup>4</sup> Appellant, however, has not provided us with any indication that it reported its commercial domicile as being in another state during 2017.

not residing in California.” However, we reject appellant’s contention that its managing members resided outside of California for lack of documentary support. The only documentary evidence pertaining to the managing members’ addresses is contained in appellant’s Articles of Organization, various Secretary of State filings, and several other documents, which consistently contain California addresses for both of appellant’s managing members. Thus, appellant has not shown that its managing members were located outside California.

Appellant nevertheless contends that it “did not conduct any business in 2017” and that “[i]f the LLC conducted no business in 2017, then clearly there were no managerial functions being performed anywhere, let alone in California.” We disagree.

Although appellant’s business activities may have been minimal in 2017, appellant was conducting some business. During 2017, it had a loan payable on its books and held real property located in Arizona. The decisions to acquire and maintain those assets would have been made by appellant’s management (since appellant appears to have had no employees during 2017), and as far as the limited factual record reflects, the only individuals authorized to manage appellant – its two member-managers – were located in California. Because appellant has not shown that the management of its business activities (however minimal those activities might have been) was conducted outside of California, we sustain FTB’s determination that appellant was commercially domiciled in California. And because appellant was commercially domiciled in California, it was “doing business” here under R&TC section 23101(b)(1) and required to file a California return and pay the minimum franchise tax of \$800.

Issue 2: Whether appellant is liable for a late-filing penalty under R&TC section 19131.

R&TC section 19131 provides that a penalty shall be imposed when a taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late-filing was due to reasonable cause and was not due to willful neglect.<sup>5</sup> Appellant failed to file a return for 2017, hence the maximum 25 percent penalty applies unless appellant sustains its burden of showing reasonable cause and lack of willful neglect. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

To establish reasonable cause, the taxpayer “must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that such cause

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<sup>5</sup> The penalty is 5 percent of the tax due for each month or fraction thereof that a valid tax return is not filed after it is due, not to exceed 25 percent of the tax. (R&TC, § 19131(a).)

existed as would prompt an ordinar[ily] intelligent and prudent business[person] to have so acted under similar circumstances.” (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) Even if the taxpayer is unaware of a filing requirement, ignorance of the law is not an excuse for failing to file a timely return. (*Appeal of GEF Operating, Inc., supra*; *Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.)

Appellant argues that the late-filing penalty should be abated because it was not doing business in California and it was not required to file a 2017 California return. We reject that argument above. Other than arguing that its legal position is correct, appellant has not attempted to show that it had reasonable cause for failing to file a return (by showing, for example, that it reasonably relied upon substantive legal advice from a qualified tax advisor that it was not required to file a California return). Accordingly, we sustain FTB’s imposition of the late-filing penalty.

Issue 3: Whether appellant is liable for a demand penalty under R&TC section 19133.

California imposes a penalty for a taxpayer’s failure to file a return or to provide information upon FTB’s written demand to do so, unless reasonable cause and lack of willful neglect prevented the taxpayer from responding to the demand. (R&TC, § 19133.) The taxpayer has the burden of proving reasonable cause for the failure to timely respond to a demand. (*Appeal of Beadling* (77-SBE-021) 1977 WL 3831.) A taxpayer’s failure to respond to a demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of GEF Operating, Inc., supra*; *Appeal of Tons, supra.*)

Here, FTB properly issued a demand to appellant, and appellant failed to timely respond thereto. Appellant does not contend, and the evidence does not show, that appellant’s failure to timely respond was due to reasonable cause. Therefore, appellant has not shown that the demand penalty should be abated.

Issue 4: Whether the filing enforcement cost recovery fee should be abated.

R&TC section 19254(a)(2) provides that if FTB mails a formal legal demand for a tax return to a taxpayer, a filing enforcement cost recovery fee is required to be imposed when the taxpayer fails or refuses to file the return within the prescribed time period. Once properly imposed, there is no provision in the Revenue and Taxation Code that would excuse FTB from

imposing the fee for any circumstances, including reasonable cause. (R&TC, § 19254; *Appeal of GEF Operating, Inc., supra; Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.)

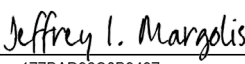
Here, FTB informed appellant in the Demand that appellant may be subject to the fee if appellant did not timely respond. FTB properly imposed the fee after it did not receive a response from appellant within the prescribed period set forth in the Demand. There is no authority for the abatement of this fee.

HOLDINGS


1. Appellant was doing business in California within the meaning of R&TC section 23101(b)(1), such that it was required to file a 2017 California return and to pay the minimum corporate franchise tax of \$800.
2. Appellant is liable for a late-filing penalty under R&TC section 19131.
3. Appellant is liable for a demand penalty under R&TC section 19133.
4. Appellant has failed to show that the filing enforcement cost recovery fee should be abated.


DISPOSITION

FTB’s action is sustained in full.

DocuSigned by:  
  
 Jeffrey I. Margolis  
 Administrative Law Judge

We concur:

DocuSigned by:  
  
 Kenneth Gast  
 Administrative Law Judge

DocuSigned by:  
  
 Sheriene Anne Ridenour  
 Administrative Law Judge

Date Issued: 3/9/2021